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BANK KERJASAMA RAKYAT MALAYSIA BHD v. MME REALTY & MANAGEMENT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI J
[CIVIL SUIT NO: 22M-176-10-2015]
B 13 FEBRUARY 2018

BANKING: *Islamic banking – Loan – Parties entered into loan agreements based on bai' al-Innah and bai' al-Istisna facilities – Borrower defaulted in payment – Bank terminated loan agreements and claimed for contractual sum, late payment* C *penalty and costs – Whether facilities valid – Whether in compliance with Shariah Advisory Council Rulings – Contracts Act 1950, s. 66*

CONTRACT: *Void contract – Islamic banking – Loan – Parties entered into loan agreements based on bai' al-Innah and bai' al-Istisna facilities – Borrower defaulted* D *in payment – Bank terminated loan agreements and claimed for contractual sum, late payment penalty and costs – Whether facilities valid – Whether in compliance with Shariah Advisory Council Rulings – Contracts Act 1950, s. 66*

The plaintiff and the defendant entered into loans agreements based on *bai' al-Innah* and *bai' al-Istisna* facilities. Pursuant to these agreements, the E plaintiff granted and disbursed six facilities to the defendant. When the defendant defaulted in the instalment payments, the plaintiff issued a notice of demand and eventually terminated the agreement. The plaintiff then filed the present claim against the defendant for the contractual sum of RM21,560,323.45, late payment penalty and costs premised on the said facilities agreements. Refuting the plaintiff's claim, the defendant argued that F the *bai' al-Innah* facilities executed by the parties were void under s. 66 of the Contracts Act 1950 ('the Act') as they were against the Shariah Advisory Council Rulings ('the SAC Rulings') because (i) the asset sale ('the ASA') and the asset purchase ('the APA') agreements contained a prescribed condition to repurchase the asset; (ii) the ASA and the APA did not identify the subject G matter of the agreements; and (iii) the sequence of the ASA and the APA were erroneous.

Held (allowing claim in part):

(1) The SAC Rulings have stipulated the prerequisites for a valid *bai'* H *al-Innah* contract, namely, (i) consisting of two clear and separate contracts, specifically, a purchase contract and a sale contract; (ii) no stipulated condition in the contract to repurchase the asset; (iii) both contracts are concluded at different times; (iv) the sequence of the contract is correct where the first sale contract shall be completely I executed before the conclusion of the second sale contract; and (v) transfer of ownership of the asset and a valid possession (*qabd*) of the asset in accordance with Syariah business practice (*'urftijari*). (para 11)

(2) The APA was not in compliance with the SAC Rulings as it contained a 'repurchase clause'. This facility, for the construction of the Immigration Depo at Kemayan, was rendered void. Therefore, pursuant to s. 66 of the Act, the defendant having received the loans under the facilities agreement, was to return the monies to the plaintiff. (paras 15 & 16)

(3) There was certainty to the transacted assets. The specified assets were found in the 'aqad' documents. The assets have been identified in the 'Lafaz aqad jualan' and 'Lafaz aqad belian'. (paras 19 & 20)

(4) Under the SAC Rulings, the parties must sign the APA first and then execute the ASA. In the present case, the parties signed the ASA first and then the APA. Since there was non-compliance with the SAC Rulings on the sequence of signing the APA and the ASA, the contract documents relating to the *bai' al-Innah* facilities were void. (paras 27 & 29)

(5) As the defendant's submission was only focused on the *bai' al-Innah* facilities, there was no issue with regard to the *bai' al-Istisna* facilities. The plaintiff's claims against the defendant premised on (i) the *bai' al-Istisna* facilities were allowed with costs; and (ii) the *bai' al-Innah* facilities were dismissed with costs. The defendant was ordered to pay back to the plaintiff the sum of RM11,841,577.32 pursuant to s. 66 of the Act. (paras 2 & 30)

Case(s) referred to:
FLH LCT Services Sdn Bhd & Anor v. Malaysian Debt Ventures Bhd [2016] 1 CLJ 243 CA ***(dist)***
Public Bank Bhd v. Mohd Isa Mohd Nafidah [2013] 1 CLJ 274 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 66

For the plaintiff - Nor Shahadah Saari; M/s Shukor Baljit & Partners
For the defendant - Mugunthan Vadiveloo; M/s Mugu & Sufyan & Co

Reported by Najib Tamby

JUDGMENT

Azizah Nawawi J:

Introduction

[1] The plaintiff's claim against the defendant is for the contractual sum of RM21,560,323.45 (as at 31 May 2015), late payment penalty and costs premised on loans agreements based on *bai' Al-Innah* and *Istisna* facilities.

[2] After a full trial, this court has made the following orders:

(i) allowed the plaintiff's claim against the defendant premised on the *Istisna* facilities;

(ii) dismissed the plaintiff's claim against the defendant premised on the *bai' al-Innah* facilities; and

(iii) that the defendant is to pay back the plaintiff the sum of RM11,841,577.32 pursuant to s. 66 of the Contracts Act 1950.

The Salient Facts

[3] The plaintiff is a cooperative body registered under the Co-operative Societies Act 1993, and is subject to the Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978. The plaintiff's business includes the business of providing loans.

[4] The defendant is a company incorporated in Malaysia with its registered address in Kuala Terengganu, Terengganu Darul Iman.

[5] The parties have agreed to the following facts:

FAKTA-FAKTA YANG DIPERSETUJUI

1. MME Realty & Management Sdn Bhd adalah merupakan pelanggan kepada Plaintif dan telah memasuki Perjanjian-perjanjian bagi enam jenis Kemudahan di bawah prinsip syariah dengan Plaintif.

2. Defendan Pertama, Defendan Kedua dan Defendan Ketiga adalah Penjamin kepada MME Realty & Management Sdn Bhd tersebut dan telah bersetuju menjamin pembayaran Kemudahan-kemudahan tersebut kepada Plaintif.

KEMUDAHAN PERTAMA

3. Di atas permintaan MME Realty & Management Sdn Bhd (selepas ini dirujuk sebagai Pelanggan), Plaintif melalui Surat Tawaran bertarikh 18.03.2009 telah meluluskan Kemudahan Kontrak Pembiayaan-i sebanyak RM11.782 juta (selepas ini dirujuk sebagai Kemudahan Pertama Tersebut) tertakluk kepada syarat-syarat dan peraturan di dalam Surat Tawaran tersebut. Kemudahan tersebut dibahagikan seperti berikut:

(i) Kemudahan A.

Kemudahan Kontrak Pembiayaan-i (Contract Financing-i Facility (CF-i) di bawah Prinsip *Bai' Al-Innah*

RM8,000,000.00 (Ringgit Malaysia: Lapan Juta sahaja)

(ii) Kemudahan B,

Jaminan Bank-i (BG-i) di bawah Prinsip *Al-Kafalah* boleh ubah kepada Kemudahan Berjangka-i (TF-i)

RM2,847,441.68 (Ringgit Malaysia: Dua Juta Lapan Ratus Empat Puluh Tujuh Ribu Empat Ratus Empat Puluh Satu dan Enam Puluh Lapan Sen sahaja)

(iii) Kemudahan C

Kemudahan Berjangka-i (TF-i) di bawah Prinsip *Bai' Al-Innah*

RM934,483.34 (Ringgit Malaysia: Sembilan Ratus Tiga Puluh Empat Ribu Empat Ratus Lapan Puluh Tiga dan Tiga Puluh Empat Sen sahaja)

4. Sebagai sekuriti kepada Kemudahan Pertama Tersebut, Pelanggan telah memasuki Perjanjian-perjanjian berikut:

(i) Asset Sale Agreement (*Kafalah*) [Bank Guarantee-i convertible to Term Financing-i (Performance)] bertarikh 18.05.2009;

(ii) Asset Purchase Agreement (*Kafalah*) [Bank Guarantee-i convertible to Term Financing-i (Performance)] bertarikh 18.05.2009;

(iii) Bank Guarantee-i [*Kafalah*]) bertarikh 18.05.2009;

(iv) Assignment of Contract Proceeds (Contract Financing-i Facility) bertarikh 18.05.2009;

(v) Assignment of Project Account bertarikh 18.05.2009;

(vi) Memorandum of Deposit bertarikh 18.5.2009;

(vii) Letter of Set-Off bertarikh 18.5.2009;

5. Sebagai sekuriti juga melalui Perjanjian Jaminan bertarikh 18.5.2009 Defendan Pertama, Defendan Kedua dan Defendan Ketiga telah bersetuju untuk menjamin perlaksanaan tanggungjawab Pelanggan di bawah Kemudahan Pertama Tersebut bukan sahaja sebagai penjamin tetapi seolah-olah Peminjam Utama. Defendan Pertama, Defendan Kedua dan Defendan Ketiga juga bersetuju untuk menanggung rugi Plaintif akan sebarang kerugian yang dialami oleh Plaintif akibat daripada keingkaran Pelanggan mematuhi syarat-syarat dan terma di bawah Kemudahan Pertama Tersebut.

KEMUDAHAN KEDUA

6. Di atas permintaan MME Realty & Management Sdn Bhd (selepas ini dirujuk sebagai Pelanggan), Plaintif melalui Surat Tawaran bertarikh 18.07.2012, Surat Pertukaran Syarat bertarikh 26.07.2012, 16.07.2013, 02.08.2013 dan 1.11.2013 telah meluluskan Kemudahan sepertimana berikut selepas ini dirujuk sebagai Kemudahan Kedua Tersebut) tertakluk kepada syarat-syarat dan peraturan di dalam Surat-surat Tawaran tersebut yang mana kemudahan tersebut dibahagikan seperti berikut:

(i) Kemudahan A.

Jaminan Bank-i (BG-i) Performance Guarantee Boleh Ubah kepada Berjangka-i (TF-i) di bawah prinsip *Al Kafalah*

RM1,533,585.44 (Ringgit Malaysia: Satu Juta Lima Ratus Tiga Puluh Tiga Ribu Lima Ratus Lapan Puluh Lima dan Empat Puluh Empat Sen Sahaja)

(ii) Kemudahan B.

Jaminan Bank-i (BG-i) (Advance Payment) Boleh Ubah kepada Berjangka-i (TF-i) di bawah prinsip *Al Kafalah*

RM4,952,927.21 (Ringgit Malaysia: Empat Juta Sembilan Ratus Lima Puluh Dua Ribu Sembilan Ratus Dua Puluh Tujuh dan Dua Puluh Satu Sen Sahaja).

(iii) Kemudahan C.

Kontrak-i (TF-i) (Berputar) - di bawah prinsip *Bai' Al-Inah*

RM7,000,000.00 (Ringgit Malaysia: Tujuh Juta Sahaja).

(i) *Al Kafalah* Bank Guarantee-i (Performance Bond) Facility [BG-i (Performance Bond)-Facility A] bertarikh 23.07.2012;

(ii) Asset Sale Agreement (*Al-Kafalah*) [Bank Guarantee-i (Performance Bond) convertible to Term Financing-i] - Facility A Bertarikh 23.07.2012;

(iii) Asset Purchase Agreement (*Al-Kafalah*) [Bank Guarantee-i (Performance Bond) convertible to Term Financing-i] - Facility A bertarikh 23.07.2012;

(iv) Memorandum of Deposit [BG-i (Performance Bond) convertible to TF-i] - Facility A bertarikh 23.07.2012;

(v) *Al-Kafalah* Bank Guarantee-i (Advance Payment) Facility [BG-i (Advance Payment) - Facility B] bertarikh 23.07.2012;

(vi) Asset Sale Agreement (*Al-Kafalah*) [Bank Guarantee-i (advance Payment) convertible to Term Financing-i] - Facility B bertarikh 23.07.2012;

(vii) Asset Purchase Agreement (*Al-Kafalah*) [Bank Guarantee-i (Advance Payment) convertible to Term Financing-i] Facility B bertarikh 23.07.2012;

(viii) Memorandum of Deposit [BG-i (Advance Payment) convertible to TF-i] - Facility B bertarikh 23.07.2012;

(ix) Asset Purchase Agreement [Contract Financing-i (CF-i) (Revolving) Facility] - Facility C bertarikh 23.07.2012;

(x) Deed of Assignment on Contract Proceeds bertarikh 23.07.2012;

(xi) Surat ikatan Penyerahan Hak (Dengan Cara Sekuriti Bagi Pembayaran Kontrak) bertarikh 23.07.2012;

(xii) Letter of Set-Off bertarikh 23.07.2012.

8. ...

KEMUDAHAN KETIGA

9. Di atas permintaan MME Realty & Management Sdn Bhd (selepas ini dirujuk sebagai Pelanggan), Plaintif melalui Surat Tawaran bertarikh 9.11.2012 dan surat pertukaran syarat bertarikh 26.11.2012 telah

meluluskan Kemudahan sebanyak RM5,255,000.00 (selepas ini dirujuk sebagai Kemudahan Ketiga Tersebut) tertakluk kepada suarat-syarat dan peraturan di dalam Surat-surat Tawaran tersebut yang mana kemudahan tersebut di bahagikan seperti berikut:

(i) Kemudahan A

Jaminan Bank-i (BG-i) (Performance Guarantee) Boleh Ubah Kepada Berjangka-i (TF-i)

RM 652,500.00 (Ringgit Malaysia: Enam Ratus Lima Puluh Dua Ribu dan Lima Ratus Sahaja).

(ii) Kemudahan B.

Jaminan Bank-i (BG-i) (Advance Payment) Boleh Ubah Kepada Berjangka-i (TF-i)

RM2,602,500.00 (Ringgit Malaysia: Dua Juta Enam Ratus Dua Ribu dan Lima Ratus Sahaja).

(iii) Kemudahan C

Kontrak-i (CF-i)

RM2,000,000.00 (Ringgit Malaysia: Dua Juta Sahaja).

10. Sebagai sekuriti kepada Kemudahan Ketiga Tersebut, Perjanjian-Perjanjian berikut telah dimasuki oleh Pelanggan:

(i) *Al Kafalah* Jaminan Bank-i (BG-i) (Performance Guarantee) Facility (BG-i (Performance Guarantee) - Facility A] bertarikh 19.11.2012;

(ii) Asset Sale Agreement (*Al-Kafalah*) [Jaminan Bank-i (BG-i) (Performance Guarantee) convertible to Berjangka-i] - Facility A bertarikh 19.11.2012;

(iii) Asset Purchase Agreement (*Al-Kafalah*) [Jaminan Bank-i (BG-i) (Performance Guarantee) convertible to Berjangka-i (TF-i) - Facility A bertarikh 19.11.2012;

(iv) Memorandum of Deposit [BG-i (Performance Guarantee) convertible to TF-i] - Facility A bertarikh 19.11.2012;

(v) *Al Kafalah* Jaminan Bank-i (BG-i) (Advance Payment) Facility [BG-i (Advance Payment) - Facility B] bertarikh 19.11.2012;

(vi) Asset Sale Agreement (*Al-Kafalah*) [Jaminan Bank-i (BG-i) (Advance Payment) convertible to Berjangka-i (TF-i)] - Facility B bertarikh 19.11.2012;

(vii) Asset Purchase Agreement (*Al-Kafalah*) [Jaminan Bank-i (BG-i) (Advance Payment) convertible to Berjangka-I (TF-i)] - Facility B bertarikh 19.11.2012;;

(viii) Memorandum of Deposit [BG-i (advance Payment) convertible to TF-i] - Facility B bertarikh 19.11.2012;

(ix) Asset Sale Agreement [Kontrak-i (CF-i) Facility] - Facility C bertarikh 19.11.2012;

(x) Asset Purchase Agreement [Kontrak-i (CF-i) Facility] - Facility C bertarikh 19.11.2012;

(xi) Surat ikatan Penyerahan Hak (Dengan Cara Sekuriti Bagi Pembayaran Kontrak) bertarikh 19.11.2012; dan

(xii) Letter of Set-Off bertarikh 19.11.2012.

11. ...

KEMUDAHAN KEEMPAT

12. Di atas permintaan MME Realty & Management Sdn Bhd (selepas ini dirujuk sebagai Pelanggan), Plaintif melalui Surat Tawaran bertarikh 9.11.2012, surat pertukaran syarat bertarikh 26.11.2012 dan 1.11.2013 telah meluluskan Kemudahan sebanyak RM5,300,348.83 (selepas ini dirujuk sebagai Kemudahan Keempat Tersebut) tertakluk kepada syarat-syarat dan peraturan di dalam Surat-surat Tawaran tersebut yang mana Kemudahan tersebut dibahagikan seperti berikut:

(i) Kemudahan A

Jaminan Bank-i (BG-i) (Performance Guarantee) Boleh Ubah Kepada Berjangka-i (TF-i) di bawah Prinsip *Al-Kafalah*.

RM625,891.47 (Ringgit Malaysia: Enam Ratus Dua Puluh Lima Ribu Lapan Ratus Sembilan Puluh Satu dan Empat Puluh Tujuh Sen Sahaja).

(ii) Kemudahan B

Jaminan Bank-i (BG-i) (Advance Payment) BOleh Ubah Kepada Berjangka-i (TF-i) di bawah Prinsip *Bai-Al Innah*

RM2,674,457.36 (Ringgit Malaysia: Dua Juta Enam Ratus Tujuh Puluh Empat Ribu, Empat Ratus Lima Puluh Tujuh dan Tiga Puluh Enam Sen Sahaja).

iii. Kemudahan C

Kontrak-i (TF-i) di bawah prinsip *Bai Al Innah*

RM2,000,000.00 (Ringgit Malaysia: Dua Juta Sahaja).

13. Sebagai sekuriti kepada Kemudahan tersebut, Perjanjian-perjanjian berikut telah dimasuki oleh Pelanggan:

(i) Al Kafalah Jaminan Bank-i (BG-i) (Performance Guarantee) Facility [BG-i (Performance Guarantee) - Facility A] bertarikh 19.11.2012;

(ii) Asset Sale Agreement (*Al-Kafalah*) [Jaminan Bank-i (BG-i] (Performance Guarantee) convertible to Berjangka-i (TF-i)] - Facility A bertarikh 19.11.2012;

(iii) Asset Purchase Agreement (*Al-Kafalah*) [Jaminan Bank-i (BG-i) (Performance Guarantee) convertible to Berjangka-i (TF-i)] - Facility A bertarikh 19.11.2012;

(iv) Memorandum of Deposit [BG-i (Performance Guarantee) convertible to TF-i] - Facility A bertarikh 19.11.2012;

(v) *Al-Kafalah* Jaminan Bank-i (BG-i) (Advance Payment) Facility [BG-i (Advance Payment) - Facility B] bertarikh 19.11.2012;

(vi) Asset Sale Agreement (*Al-Kafalah*) [Jaminan Bank-i (BG-i) (Advance Payment) convertible 10 Berjangka-i (TF-i)] - Facility B bertarikh 19.11.2012;

(vii) Asset Purchase Agreement (*Al-Kafalah*) [Jaminan Bank-i (BG-i) (advance Payment) convertible to Berjangka-i (TF-i)] - Facility B bertarikh 19.11.2012;

(viii) Memorandum of Deposit [BG-i (Advance Payment) convertible to TF-i] - Facility B bertarikh 19.11.2012;

(ix) Asset Sale Agreement [Kontrak-i (CF-i) Facility] - Facility C bertarikh 19.11.2012;

(x) Asset Purchase Agreement [Kontrak-i (CF-i) Facility] - Facility C bertarikh 19.11.2012;

(xi) Deed of Assignment on Contract Proceeds bertarikh 19.11.2012;

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KEMUDAHAN KELIMA

15. Di atas permintaan MME Realty & Management Sdn Bhd (selepas ini dirujuk sebagai Pelanggan), Plaintif melalui Surat Tawaran bertarikh 30.5.2008, surat pertukaran syarat bertarikh 11.6.2010 dan 25.6.2010 telah meluluskan Kemudahan Bridging Financing-i di bawah Prinsip Syariah *Bai' Al-Istisna* sebanyak RM6.2 juta (selepas ini dirujuk sebagai Kemudahan Kelima Tersebut) tertakluk kepada syarat-syarat dan peraturan di dalam Surat-surat Tawaran tersebut.

Plaintif akan merujuk kepada Surat-surat Tawaran tersebut untuk natijah sepenuhnya semasa perbicaraan atau apa-apa perbicaraan interlokutari kelak.

16. Sebagai sekuriti kepada Kemudahan tersebut, Perjanjian-Perjanjian berikut telah dimasuki oleh Pelanggan:

(i) *Istisna'* Sale Agreement bertarikh 7.7.2010;

(ii) *Istisna'* Purchase Agreement bertarikh 7.7.2010;

(iii) Deed of Assignment of Sales Proceed bertarikh 7.7.2010;

17. ...

KEMUDAHAN KEENAM

18. Di atas permintaan MME Realty & Management Sdn Bhd (selepas ini dirujuk sebagai Pelanggan), Plaintif melalui Surat Tawaran bertarikh 1.11.2011 telah meluluskan Kemudahan Penyambung-i (PF-i) di bawah Prinsip Syariah *Bai' Al-Istisna* sebanyak RM3 juta (selepas ini dirujuk sebagai Kemudahan Keenam Tersebut) tertakluk kepada syarat-syarat dan peraturan di dalam Surat Tawaran tersebut.

19. Sebagai sekuriti kepada Kemudahan Keenam Tersebut, Perjanjian-Perjanjian berikut telah dimasuki oleh Pelanggan:

(i) *Istisna'* Facility Agreement bertarikh 21.11.2011;

(ii) Deed of Assignment of Sales Proceeds bertarikh 21.11.2011; dan

(iii) Deed of Assignment of Designated Account bertarikh 21.11.2011.

Plaintif akan merujuk kepada dokumen-dokumen tersebut untuk natijah sepenuhnya semasa perbicaraan atau apa-apa perbicaraan interlokutari kelak.

20. ...

21. ...

22. ...

23. Pelanggan juga telah digulungkan melalui satu perintah di Mahkamah Tinggi Shah Alam melalui Petisyen Penggulungan bernombor 28NCC-193-06/2014 pada 10.9.2014.

24. Plaintif menerusi Peguamcaranya, Tetuan Shukor Baljit & Partners telah menghantar Notis Tuntutan bertarikh 4.3.2015 bagi setiap satu kemudahan kepada Pelanggan, Defendan Pertama, Defendan Kedua dan Defendan Ketiga untuk menuntut jumlah yang tertunggak di bawah Kemudahan Pertama, Kemudahan Kedua, Kemudahan Ketiga, Kemudahan Keempat, Kemudahan Kelima dan Kemudahan Keenam Tersebut.

25. Seterusnya Plaintif menerusi Peguamcaranya telah menghantar Notis Penamatan bertarikh 26.3.2015 bagi setiap satu kemudahan tersebut kepada Pelanggan, Defendan Pertama, Defendan Kedua dan Defendan Ketiga untuk menamatkan Keenam-enam Kemudahan Tersebut dan menuntut keseluruhan amaun yang masih terhutang dan belum dibayar di bawah Keenam-enam Kemudahan Tersebut.

[6] Essentially, all the six facilities have been disbursed to the defendant.

[7] When the defendant defaulted in the instalment payments, the plaintiff issued a notice of demand dated 4 March 2015, and eventually terminated the agreement *vide* a letter dated 26 March 2015 when the defendant continued with the default in the payments of the outstanding sum. The amount claimed in the said letter of demand is RM21,560,323.45 as at 30 May 2015.

[8] There is no dispute that the loans have been disbursed to the defendant. It is also not in dispute that the defendant has failed to pay the loans and the same has been terminated by the plaintiff. Hence the plaintiff claimed the same against the defendant.

Issues to be Tried

[9] Parties have agreed to the following issues to be tried:

(i) "Sama ada MME Realty & Management Sdn Bhd adalah terikat dengan perjanjian-perjanjian bagi keenam-enam kemudahan tersebut?"

(ii) "Sama ada MME Realty & Management Sdn Bhd telah mengingkari dan memecahkan terma-terma perjanjian-perjanjian bagi keenam-enam kemudahan tersebut?"

(iii) "Sama ada MME Realty & Management Sdn Bhd adalah berhutang kepada plaintif"

(iv) "Sama ada MME Realty & Management Sdn Bhd memasuki perjanjian-perjanjian bagi keenam-enam kemudahan tersebut akibat pernyataan silap cuai plaintif?"

(v) "Sama ada plaintif memasuki enam kontrak kolateral dengan MME Realty Management?"

(vi) "Sama ada kemudahan-kemudahan Prinsip *Bai' Al-Innah* di dalam kemudahan satu hingga empat mengikut peruntukan Shariah Advisory Council Guidelines dari Bank Negara Malaysia?"

(vii) "Sama ada asset sale agreement dan asset purchase agreement yang terkandung di dalam perenggan 4(i) dan (ii), 7(i) - (iii), (vi), (viii) dan (ix), 10 (ii), (iii), (vi), (vii), (ix), (x) dan 13 (ii), (iii), (vi), (vii), (ix), (x) pernyataan tuntutan tidak sah kerana ketidaktentuan?"

Findings Of The Court

[10] The core issues raised by the defendant are with regards to issues (vi) and (vii), that is, whether the *bai' al-Inah* facilities executed by the parties are void under s. 66 of the Contracts Act 1950. The defendant takes the position that the *bai' al-Inah* facilities granted to the defendant are void, as they are against the Shariah Advisory Council ("SAC") Rulings on the *bai' al-Inah* facilities, which stipulates that a valid *bai' al-Inah* facility must comply with the following conditions:

(i) consisting of two clear and separate contracts, namely a purchase contract and a sale contract;

(ii) no stipulated condition in the contract to repurchase the asset;

(iii) both contracts are concluded at different times;

(iv) the sequence of each contract is correct, whereby the first sale contract shall be completely executed before the conclusion of the second sale contract; and

(v) transfer of ownership of the asset and a valid possession (*qabd*) of the asset in accordance with Syariah and the current business practice.

[11] In its 16th Meeting dated 11 November 2000 and 82nd Meeting dated 17 February 2009, the SAC has stipulated the following prerequisites for a valid *bai' al-Inah* contract:

(i) consisting of two clear and separate contracts, namely, a purchase contract and a sale contract;

(ii) no stipulated condition in the contract to repurchase the asset;

(iii) both contracts are concluded at different times;

(iv) the sequence of the contract is correct, whereby the first sale contract shall be completely executed before the conclusion of the second sale contract; and

(v) transfer of ownership of the asset and a valid possession (*Qabd*) of the asset in accordance with Syariah and current business practice ('*urftijari*').

[12] The SAC has also resolved in its 82nd Meeting dated 17 February 2009, that the stipulation to repurchase the asset in *bai' al-Inah* contract will render the contract as void.

[13] Premised on the above SAC Rulings, the defendant submits that the present *bai' al-Inah* facilities are void based on three grounds:

(i) That the asset sale agreement ("ASA") and asset purchase agreement ("APA") contained prescribed condition to repurchase the asset;

(ii) That the ASA and APA do not identify the subject matter of the agreements; and

(iii) That the sequence of the ASA and APA are erroneous.

[14] However, the plaintiff takes the position that the said SAC Rulings are not applicable as the SAC Rulings were issued in 2010, whereas the documents herein were signed in 2009. However, I am of the considered opinion that this is only applicable to stipulation (ii), that there shall be no stipulated condition in the contract to repurchase the asset. The other requirements arise from the year 2000 Meeting and would cover the *bai' al-Inah* facilities herein.

Issue (i) The ASA And APA Contained Prescribed Condition To Repurchase The Asset

[15] Having considered the evidence, I agree with the defendant that the APA dated 23 July 2012 for the Immigration Depo at Kemayan, Pahang for RM13,486,512.65 (pp. 479-508 CBD/B2) is not in compliance with the SAC Rulings, in that in recital C, it contains a 'repurchase clause', and it reads:

> On consideration of the Bank having agreed to grant the Customer the Facility, the Customer hereby agrees to sell and the Bank hereby **agrees to repurchase** the assets as described in the Second Schedule hereto

(hereinafter referred as the "Identified Asset") free from encumbrances at the Purchase Price as described in Section 3 of the First Schedule hereto an in accordance with the terms and conditions as stipulated herein and in the Asset Sale Agreement.

[16] Premised on the SAC Ruling, then this facility, for the construction of the Immigration Depo at Kemayan, is rendered void. Therefore, pursuant to s. 66 of the Contracts Act 1950, the defendant having received the loans under the facilities agreement is to return the monies to the plaintiff.

Issue (ii) Whether The ASA And APA Do Not Identify The Subject Matter Of The Agreements

[17] The next issue raised by the defendant is that the ASA and the APA do not identify the subject matter of the agreements. The defendant relied on the case of *FLH LCT Services Sdn Bhd & Anor v. Malaysian Debt Ventures Bhd* [2016] 1 CLJ 243; [2016] 1 MLJ 248, where the Court of Appeal held as follows:

[25] In our view the essence of *bai al-inah* transaction or contract in the matter before us as entered into by the parties herein must necessarily be grounded upon the basic premise that it must involve the sale and buy back transactions of an asset of a seller. The existence of the asset in the transactions is an imperative without which such contract is not a *bai al-inah*, but something else outside the Syariah System.

[18] The Court of Appeal then look at the relevant security documents, such as the APA, ASA and the MFA and held that:

[30] We have tooth-combed the first LO, its schedule and appendix. We could find no mention of any asset in the first LO to be transacted in the MFA, ASA and APA. We have similarly tooth-combed the second LO. There is equally no mention of any asset in the Second LO to be transacted in the relevant MFA, ASA and APA ...

…

[33] On the factual matrix of the case enumerated above, it is apparent that at the time the security documents (MFA, ASA and APA) were executed on 31 July 2009, the underlying asset in the *Bai al-inah* contract does not appear to exist. At the risk of being repetitive, in the MFA and both the ASA and the APA, the descriptions of the asset were merely referred to 'as set out in letter(s) of offer (if any)'. As said earlier, the first and second LO did not mention any asset whatsoever. Hence it begs the question what actually was being transacted on 31 July 2009 between the seller and purchaser in the MFA, ASA and APA. There are uncertainties in the underlying feature of the said *bai al-inah* contract/financing ie, the existence of the asset in the transactions. Following through, hence the akad to sell and akad to purchase the asset are not certain and distinct in the absence of the same, a fundamental requirement under the *bai al-inah* contract.

[19] Applying the above principle, I have looked at the evidence and find that the assets have been identified in the 'lafaz aqad jualan' and 'lafaz aqad belian'. An example can be seen from "lafaz aqad jualan" for Facility A (at p. 127A/B11) and the asset is described as "Sijil Rakyat Holdings Sdn Bhd bernombor 7443-7449 bernilai RM1,732,500.00". The same asset is referred to in the "lafaz aqad belian" at p. 128/B11. The other assets can also be seen from the 'lafaz aqad jualan' and 'lafaz aqad belian' at pp. 136 and 137 of B11. The other assets are reflected from the plaintiff's computer system under "Maklumat Akad Jual Beli" at pp. 1992 - 1994 of B12.

[20] Therefore unlike the case of *Malaysian Debt Venture (supra)* where no detail of asset can be found in any of the security documents, in our present case, the specified assets are found in the 'aqad' documents. Therefore, I am of the considered opinion that there is certainty with regards to the transacted asset and thus the facilities documents comply with the relevant SAC rulings.

Issue (iii) That The Sequence Of The ASA And APA Are Erroneous

[21] The SAC guidelines clearly stipulate the following prerequisites in relation to the sequence of the asset purchase and sale agreements for a valid *bai' al-Inah* contract:

> "(i) consisting of two clear and separate contracts, namely, a purchase contract and a sale contract" and
>
> "(iv) the sequence of the contract is correct, whereby the first sale contract shall be completely executed before the conclusion of the second sale contract"

[22] In *Public Bank Bhd v. Mohd Isa Mohd Nafidah* [2013] 1 CLJ 274; [2012] MLRHU 1, Mohd Zawawi Salleh J (as His Lordship then was) said at pp. 4-5:

> *Bai Al-Inah*
>
> [10] There is no room for doubt that this instant case concerns a transaction based on *Bai Al-Inah*. Under a typical *Bai Al-Inah* transaction for residential housing, **the purchasers are required to execute two agreements: firstly, the Property Purchase Agreement ("PPA") and secondly, the Property Sale Agreement ("PSA")**. The first agreement (PPA) provides that the purchasers agree to sell the property, which he purchased from the developer, at a price similar to the price he agrees with the developer to that particular Islamic Bank or Islamic Window Bank ("IWB") and an undertaking that they (the purchasers) are to re-purchase the property from the bank. The second agreement is the Property Sale Agreement. Under this agreement (PSA), the property (which has been vested in the Bank) is sold by the Bank back to the purchaser, at an increased price. The purchasers are required to repay the Bank this price, by way of instalments for a specific duration until the sale price is fully settled. The Bank will get profit, being the difference between the price stipulated in the PPA and the price stated in the PSA (the sale price). (emphasis added)

[23] In *Law and Practice of Islamic Banking and Finance* (3rd edn) by Nik Norzrul Thani, Mohamed Ridza Abdullah, Megat Hizaini Hassan, the learned authors wrote:

> [7.025] In terms of sequence, the **Shariah Advisory Council at Bank Negara Malaysia's ruling also reflected that the asset purchase agreement takes place prior to the execution of the asset sale agreement** if both the asset purchase agreement and the asset sale agreement are executed on the same day. If there are security agreements to be executed, it would take place after the execution of the asset sale agreement.
>
> [7.026] In one of the transactions which involved the author as an adviser, a ceremony of contract execution was performed utilising the true principles of Shari'ah which was witnessed and confirmed by three muftis on the authenticity of the transaction according to Shari'ah. As an illustration, the following was the sequence of events:
>
> A. First contract ceremony (Asset purchase agreement)
>
> First: Execution of **the asset purchase agreement by the customer**.
>
> Second: Execution of the asset purchase agreement by the financier.
>
> Third: The customer declares the offer (Ijab) to the financier identifying the asset to be sold with a purchase price stipulated to be paid in cash.
>
> Fourth: The financier signifies its acceptance (Qabul) to the offer by agreeing to purchase the asset at the agreed purchase price to be paid in cash.
>
> Fifth: Confirmation from Shari'ah advisers on the transaction as witnesses.
>
> Sixth: The customer hands over the title of the asset to the financier.
>
> Seventh: The financier accepts the title of the asset from the customer and pays to the customer the purchase price of the asset.
>
> Eight: The customer accepts the payment from the financier for the asset sold.
>
> B. Second contract ceremony (Asset sale agreement)
>
> First: Execution of the **asset sale agreement by the financier**.
>
> Second: Execution of the asset sale agreement by the customer.
>
> Third: The financier declares the offer (Ijab) to the customer identifying the asset to be sold with a purchase price stipulated (which comprises the aggregate value of the purchase price in the asset purchase agreement and a profit) to be paid on a deferred basis as per the terms of the agreement.
>
> Fourth: The customer signifies its acceptance (Qabul) to the offer by agreeing to purchase the asset at the agreed purchase price to be paid on a deferred basis.

Fifth: Confirmation from Shari'ah advisers on the transaction as witnesses.

Sixth: The financier hands over the title of the asset to the customer.

Seventh: The customer accepts the title of the asset from the financier. (emphasis added)

[24] Therefore, it is clear that the asset purchase agreement (APA) precedes the asset sale agreement (ASA).

[25] However, in their evidence, the plaintiff's witnesses gave evidence that it was the ASA that was executed first. Under cross examination, PW3 says as follows:

PW3: Ya mula-mula jam 2.47 petang, **bank memasuki kontrak, bank jual dulu asset kepada pelanggan dengan harga jualan**.

YA: Wait, bank jual sijil kepada pelanggan. Okay.

PW3: Ya. **Apabila pelanggan telah setuju membeli, jadi asset berada ditangan pelangganlah**. Dia setuju membeli dengan harga jualan yang ditetapkan dalam kontrak. Jadi, akad yang berasingan seterusnya adalah bank membeli semula asset tadi, sijil, daripada pelanggan dengan membayar tunai. (pg 68/NOP)

….

PW3: Di dalam bank kita banyak produk yang menggunakan *bai innah* ini. Jadi *bai innah* ini bergantung kepada kontrak ketika itu, produk apa yang kita enter dengan pelanggan. Jadi saya mengekalkan jawapn saya, **berdasarkan produk yang kita tawarkan untuk pembiayaan ini, berdasarkan konsep *bai innah*, kita menjual terlebih dahulu. Ini adalh keputusan general konsep bai innah**. (pg 70/NOP)

….

PW3: Untuk kontrak ini, **saya sahkan kita menjual terlebih dahulu, kemudian kita akan memasuki akad pembelian**."

(pg 71/NOP)

[26] PW4 gave the following evidence under cross-examination:

"PD: Dokumen mana yang pertama ditandatangani?

PW4: Pertama dalam akad *Innah*, kita akan masuk lafaz akad jualan.

PD: Akad Jualan?

PW4: **Ya. Bank akan jual dulu**.

PD: Then only akad belian?

PW4: Ya betul. (pg 87/NOP)

….

PD: Alright but in terms of sequence of signing the agreements, there is the Asset Sale Agreement and the Asset Purchase Agreement. Which document to sign first? Asset sale or asset purchase?

PW4: Pada agreement tidak masalah yang penting akad dilakukan mengikut sequence. Lafaz akad itu dilakukan mengikut sequence. Sebab itu kita ada buat borang akad itu, kita boleh lafaz akad jualan dahulu selepas barulah lafaz akad belian. Sebab itu kita pakai borang ...

(pg 88/89 NOP)

[27] Therefore, I agree with the defendant that under the SAC guidelines, the parties must sign the purchase contract (APA) first, and then execute the sale contract (ASA). In this case, since the parties have signed the ASA first, and then the APA, these transactions have not complied with the SAC guidelines and are therefore void.

[28] However, it is the submission of the plaintiff that the sequence of the APA and ASA are inconsequential, as the lafaz aqad have been done in compliance of the SAC Rulings on aqad as can be seen from the exhibits.

[29] Even though the aqad complies with the SAC Rulings, the APA and the ASA did not comply with the SAC Rulings. I am therefore of the considered opinion that all SAC Rulings must be complied with. Since there was non-compliance with the SAC Rulings on the sequence of signing the APA and the ASA, therefore the contract documents with regards to the *bai' al-Inah* facilities are void. As such, pursuant to s. 66 of the Contracts Act, the defendant, having received the loans under the facilities agreement is to return the monies to the plaintiff.

[30] As the defendant's submission is only focused on the *bai' al-Inah* facilities, there is no issue with regards to the fifth and the sixth facilities, which are the *bai Istisna* facilities. The plaintiff's claims premised on the *bai Istisna* facilities are allowed with costs.